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No. 90-1972

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent does not defend the court of appeals' holding that prosecutors are under a duty to disclose exculpatory evidence to the grand jury. For two reasons, however, he contends that this Court should not review that holding. First, he suggests that the issue presented by the petition cannot be considered by this Court because it was not raised by the government in the lower courts. Second, he argues that there is no conflict in the circuits on the question presented.

1. Addressing the latter point first, respondent's claim that there is no circuit conflict (Br. in Opp. 9-14) is answered by the Tenth Circuit's own decision in *United States* v. *Page*, 808 F.2d 723, cert. denied, 482 U.S. 918 (1987). As we explained in our petition (at 9-10), the Tenth Circuit expressly acknowledged that its rule—that a prosecutor must disclose

exculpatory evidence to the grand jury—conflicts with the holdings of courts that "have held that there is no such duty." 808 F.2d at 727, citing *United States* v. *Adamo*, 742 F.2d 927, 937 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); *United States* v. *Sears Roebuck & Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984).

The Tenth Circuit was correct in stating that other courts of appeals have refused to saddle prosecutors with a duty to disclose exculpatory evidence to the grand jury. Five other circuits have held that a prosecutor has no such obligation. See Pet. 8 (citing cases). Respondent claims (Br. in Opp. 10) that, "without exception, these cases are factually and legally distinguishable." Distinctions, of course, may be drawn between any two decisions, but respondent fails to show why any of the distinctions he draws are legally relevant. It is difficult to see, for example, how the Sixth Circuit could have been clearer in holding that "[a] federal prosecutor is not obligated to present exculpatory evidence to the grand jury. * * * [T]he prosecutor did not violate an affirmative duty to disclose exculpatory evidence to the grand jury because there is no such duty." *Adamo*, 742 F.2d at 937.[1] Similarly, the Ninth Circuit has unequivocally

[1] Respondent's statement (Br. in Opp. 11) that the court in *Adamo* found the exculpatory evidence to be *"not substantial"* is not borne out by the court's opinion. The court simply characterized each item of withheld evidence as "exculpatory" and held that "[s]ince disclosure of exculpatory evidence is not required, it follows that failure to disclose cannot constitute prosecutorial misconduct productive of a biased grand jury." 742 F.2d at 938. See also *United States* v. *Blanton*, 700 F.2d 298, 311 (6th Cir. 1983) ("[T]he government is under no duty to provide evidence which would be favorable to the defendant."), cert. denied, 465 U.S. 1099 (1984).

held that its precedents do "not impose an affirmative duty on the prosecutor to present exculpatory evidence. * * * 'The prosecutor has no duty to present to the grand jury all matters bearing on the credibility of witness *or any exculpatory evidence.*'" *United States* v. *Larrazolo*, 869 F.2d 1354, 1359 (1989).[2] The Eleventh Circuit is equally committed to the view that "[t]he government is not obligated to present exculpatory evidence to a grand jury." *United States* v. *Hawkins*, 765 F.2d 1482, 1488 (1985), cert. denied, 474 U.S. 1103 (1986).[3]

Respondent's effort to brush aside those cases based on supposed "factual" distinctions actually reveals the extraordinary breadth of the court of appeals'

[2] See also *United States* v. *Cederquist*, 641 F.2d 1347, 1353 n.3 (9th Cir. 1981) ("[A] grand jury investigation is not an adversary proceeding and the failure of the prosecution to bring forth evidence favorable to the defendants does not present a basis to dismiss an indictment."); *United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.) (finding no duty to disclose "any exculpatory evidence"), cert. denied, 461 U.S. 932 (1983); *United States* v. *McClintock*, 748 F.2d 1278, 1285 n.3 (9th Cir. 1984) ("We reject any argument that the indictment should be dismissed for failure of the prosecutor to present exculpatory material to the grand jury. The prosecutor has no such legal obligation."), cert. denied, 474 U.S. 822 (1985).

[3] The First and Eighth Circuits have stated, in more qualified terms, that a "prosecutor before a grand jury is not normally under a duty to disclose exculpatory evidence." *United States* v. *Rivera-Santiago*, 872 F.2d 1073, 1087 (1st Cir.), cert. denied, 492 U.S. 910 (1989); *United States* v. *Vincent*, 901 F.2d 97, 99 (8th Cir. 1990). Neither court, however, has ever dismissed an indictment because of the prosecutor's failure to present exculpatory evidence, and neither has stated that it agrees with *Page*. We do not agree with respondent (Br. in Opp. 11) that our reliance on those decisions is "curious."

holding in this case and its divergence from the rule in other circuits. While respondent claims that *Adamo* is distinguishable because the evidence there "was subject to differing interpretations," and *Larrazolo* differs because "the allegedly exculpatory evidence could be interpreted in inconsistent manners," Br. in Opp. 11, the court of appeals in this case never disputed that respondent's "exculpatory" evidence was ambiguous and susceptible to different interpretations. To the contrary, the court recognized that respondent's evidence "may seem irrelevant and self-serving under the government's theory of the case," but nevertheless held that the government was required to disclose it because "it would have been reasonable in this case for the grand jury to adopt a [different] theory," and "the grand jury must receive *any* information that is relevant to *any* reasonable theory it may adopt." Pet. App. 8a (emphasis added).[4] It is precisely the court of appeals' willingness to indulge defense theories of the case in determining whether evidence is exculpatory, and its insistence that such equivocal evidence must be disclosed on pain of dismissal of the indictment, that puts the Tenth Circuit directly at odds with the rulings of other courts of appeals.[5]

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[4] Respondent's equation (Br. in Opp. 12 n.5) of the regime created by the Tenth Circuit with the policy of the Department of Justice to present substantial evidence that directly negates guilt (see Pet. 15 n.8) is inaccurate. The court of appeals' rule goes far beyond the Department's policy and imposes amorphous obligations on prosecutors that are enforceable, after the fact, by the sanction of dismissal.

[5] In passing, respondent implies (Br. in Opp. 10) that the court of appeals' decision is supported by *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988). *Bank of Nova Scotia*, however, addresses the degree of prejudice needed to warrant the dismissal of an indictment once it is found that a prosecutor engaged in misconduct. The issue here is whether it is misconduct at all when a prosecutor fails to present exculpatory evidence. Respondent also confuses the distinct issues of violation and remedy in relying on decisions that are said to "recognize that an indictment may be dismissed if the government's conduct materially affects the integrity of the grand jury process thus unduly influencing the charging decision." Br. in Opp. 12. Not only did none of those cases deal with the withholding of exculpatory evidence, but in only one of respondent's cases was an indictment actually dismissed (*United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979)).

2. Respondent also errs in suggesting (Br. in Opp. 3-9) that the petition should be denied for the reason that this Court will not normally review a question that was not "pressed or passed upon below." *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). To begin with, the question presented was clearly "passed upon" by the court of appeals. In reliance on *Page*, the court held that "a prosecutor has the duty to present substantial exculpatory evidence to the grand jury." Pet. App. 5a. It then interpreted that standard to mean that "the grand jury must receive any information that is relevant to any reasonable theory" of defense. *Id.* at 8a. The court of appeals therefore squarely determined the issue presented by our petition.[6]

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[6] That the issue in this case was decided by the court of appeals and is an important question of federal law is sufficient to justify this Court's review. *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991); *Stevens* v. *Department of the Treasury*, 111 S. Ct. 1562, 1567 (1991). As the Court stated in *Virginia Bankshares*, 111 S. Ct. at 2761 n.8:

> Respondents argue that this issue was not raised below. * * * It suffices for our purposes that the court

Respondent nevertheless claims that because the government accepted *Page* as binding circuit precedent in its court of appeals filings in this case, this Court should not consider the question presented by our petition. We do not agree. In *Page*, the court of appeals had explicitly rejected our argument that there is no duty to disclose exculpatory evidence to the grand jury.[7] Because the government prevailed in *Page* on the particular facts of that case, we had no opportunity to petition this Court for a writ of certiorari to review the court of appeals' legal ruling. The government was therefore bound to comply with *Page* in the Tenth Circuit. Although we did not ask the court of appeals to overrule *Page* in this case, we strenuously resisted its expansion to cover the sort of ambiguous evidence on which respondent relied in asserting prosecutorial misconduct. We claimed that, just as in *Page*, the particular withheld evidence cited by respondent was not substantial exculpatory evidence, Gov't C.A. Br. 42-43, and that the prosecution is not required "to present evidence to the grand jury under any theory other than its own." Gov't C.A.

below passed on the issue presented, *Stevens* v. *Department of the Treasury*, 111 S. Ct. 1562, 1567 (1991); cf. *Cohen* v. *Cowles Media Co.*, 111 S. Ct. 2513, 2517 (1991), particularly where the issue is, we believe, 'in a state of evolving definition and uncertainty.'" *St. Louis* v. *Praprotnick*, 485 U.S. 112, 120 (1988) (plurality opinion), quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981), and one of importance to the administration of federal law. *Praprotnick, supra*, at 120-121.

[7] The defendant in *Page* claimed his indictment should be dismissed because the government had failed to disclose exculpatory evidence to the grand jury; as the court noted, "[t]he government counters that a prosecutor has no duty to disclose exculpatory evidence." 808 F.2d at 727. The court of appeals then rejected our submission. *Id.* at 728.

Reply Br. 15.[8] While our briefs in the court of appeals acknowledged that under the rule announced in *Page* the government has "certain responsibilities," Gov't C.A. Reply Br. 9, we also stated that the *outcome* in this case should be the same as in *Page* (*i.e.*, the indictment should not be dismissed) because in both cases "the evidence not presented (or presented in part) is as consistent with the prosecution's theory of the case as it is with the defendant's theory." Gov't C.A. Br. 42-43.[9]

There is no question that the scope of *Page* was litigated by both parties and decided by the court of appeals in this case. There is also no question that the government has raised in the Tenth Circuit its claims that a prosecutor has no duty to disclose exculpatory evidence, *Page*, 808 F.2d at 727, and that, in any event, no such duty extends to evidence that is simply "consistent with [a] possible theory" of defense. Pet. App. 11a. The court of appeals, however, by enunciating its rule in *Page* and then broadening it in the present case, has manifested a firm commit-

[8] We also argued that in this case, unlike in *Page*, "much of the evidence which the defendant complains was withheld, was in fact presented" to the grand jury. Gov't C.A. Br. 42-43. As we explained in our petition, the court rejected that argument based on an incomplete record, and the government sought rehearing so that the court could reexamine its holding in light of the full grand jury record. Pet. 6 n.1. The court, however, declined to do so. Pet. App. 27a-28a.

[9] It was in arguing that the evidence in this case is not truly exculpatory that we stated that the court of appeals "should follow the holding of *Page*." Gov't C.A. Br. 43. That is a far different point from respondent's implication (Br. in Opp. 4-5), that we urged the court to follow *Page*'s holding that there is a duty to disclose exculpatory evidence.

ment to its contrary position.[10] Accordingly, this is not a case in which the court of appeals was deprived of an opportunity to pass on the issue raised by our petition.

The cases on which respondent relies (Br. in Opp. 5-9) all involve the failure of a party to raise a particular question in the courts below. In this case, the government clearly raised the question that we have presented to this Court: whether the court of appeals improperly ordered the indictment dismissed because of a failure to present exculpatory evidence to the grand jury. The only difference between our submission in the court of appeals and our submission in this Court is that in this Court we have questioned not only the extension of *Page* to the facts of this case, but also the rule in *Page* itself. The court of appeals was not denied the opportunity to consider the issue we have presented to this Court; rather, it embraced the position that the government is required to submit exculpatory evidence to the grand jury and extended that obligation to "any information that is relevant to any reasonable theory [the grand jury] may adopt." Pet. App. 8a. The correctness of that rule, which was the subject of the litigation below, is the issue before this Court.

This case therefore has nothing in common with *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 n.2 (1989), in which the pertinent issue was not even presented in the petition for a writ of certiorari, or *EEOC* v. *FLRA*, 476 U.S. 19, 23-24 (1986), in which a pertinent objection had not been urged before the Federal Labor Relations

[10] Between *Page* and this case, six of the ten active Tenth Circuit judges have embraced the principle challenged by our petition; no Tenth Circuit judge has indicated disagreement with that view.

Authority. See also *Sonzinski* v. *United States*, 300 U.S. 506, 514 (1937) (declining to consider issues not "assign[ed] as error below").

The criminal cases cited by respondent (Br. in Opp. 6-8) are also inapposite. In *United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976), where the Court declined to address the issue of the defendant's standing to litigate a Fourth Amendment claim because it had not been raised below, the government had stated that the issue was "not presented as an issue for resolution by this Court." See U.S. Br. 5 n.4 (No. 75-19). In *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977), unlike in this case, the court of appeals had not addressed the issue that the government urged the Court to decide; only a dissent had discussed it. See *United States* v. *Lovasco*, 532 F.2d 59 (8th Cir. 1976); *id.* at 62 (Henley, J., dissenting). And in *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975), the government reversed its position from that taken in the court of appeals, and the issue involved a peculiar question of retroactivity of a court of appeals decision that was only of passing importance even within that circuit. Here, we squarely opposed the legal rule that the Tenth Circuit adopted in *Page*; we then asserted in this case, not that *Page* was correct, but that its holding did not require dismissal of the indictment. The question presented in this case is therefore properly before this Court.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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